

## Flipped on its head?

**A recent Canadian Supreme Court ruling on the traditional fishing rights of the M'ikmaq threatens relations with commercial fishermen**

**T**he native peoples of Canada represent approximately five per cent of the country's population. They live along the three ocean coasts of the country as well as inland, and have been on the continent for thousands of years. During the 17th and 18th centuries, the then British colonial power entered into various treaties with them, sometimes for purposes of peace and friendship, and sometimes to guarantee territory and trade.

One such treaty was agreed to in 1760 between the British Governor Lawrence and the M'ikmaq peoples who fished and hunted in the regions of Eastern Canada bordering the Atlantic. The treaty itself generally fell into disuse but was used in defence of a M'ikmaq fisherman, Donald Marshall Jr., who was charged with fishing in a closed area, using unregulated gear.

The case found its way through Canada's judicial system right up to the Supreme Court. On 17 September 1999, the Supreme Court acquitted Marshall on the basis that the treaty gave him a right to fish and trade such fish in order to earn a moderate livelihood for himself and his family. The court decision made it explicit that the treaty right could be regulated and subject to catch limits that provided for a moderate livelihood.

However, some M'ikmaq people believed they now had a recognized right to fish when and where they so chose, and began placing lobster traps into areas where the lobster season was closed.

As the M'ikmaq built up their fishing presence in closed lobster areas, commercial fishermen who rely on the same lobster area for their livelihood grew increasingly angry as the Government

Department of Fisheries made no attempts to restrain the out-of-season fishing.

The situation exploded on 3 October when fishermen in the Miramichi Bay off the coast of New Brunswick sent out 100 boats that proceeded to haul up native lobster traps, removed the meshing, returned the lobsters to the water and sank the disabled traps.

Native persons responded by taking over the government wharf at Burnt Church on the Miramichi, burning two fishermen's trucks and bringing in what they refer to as their 'warrior society'. Native and non-native people were driven into direct and violent conflict with one another, and similar situations threatened to break out in other coastal areas.

The Marshall Case was now preoccupying the media and the political leaders of the country. The decision of the Supreme Court judges was questioned widely, and two of the seven judges also dissented. The Premier of Newfoundland, Brian Tobin, blasted the judges for not understanding the nature of the fishery and for not providing a period of time for the implications of the decision to be properly managed and implemented. The entire commercial fishing sector in Eastern Canada was protesting, calling for a moratorium and political intervention. They felt the fishery as they knew it was being undermined.

### **Restrictive regime**

The reader not familiar with Canada must remember that there are 50,000 fishermen in Atlantic Canada fishing under a very restrictive fisheries management regime. The lobster fishery is particularly sensitive because the species is widely dispersed in inshore waters along a very large

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coastline. It is a fishery broken down by zones (lobster is a sedentary species seldom moving beyond 25 km of its habitat), and each of the 44 zones has a specified season that is rigidly enforced.

**L**icences are limited, and their total number frozen. This limited entry has led, over time, to licences acquiring a value and being considered as quasi-property. If you had invested \$100,000 in a lobster licence, you might get a little anxious if you saw a few native fishermen fishing out of season, apparently authorized by the Supreme Court to do so, and catching with each trap ten times as many lobsters as the commercial fishermen catch in season.

The M'ikmaq people, for their part, have historically been marginalized into a reserve system (although they also have full rights as Canadian citizens), where rates of unemployment are astronomical, levels of education low, and standards of living below the poverty line. They believe their fishing rights have been denied them under the modern fisheries management regime.

In total numbers, the M'ikmaq pose no serious threat to commercial fishermen, except in localized areas where there are significant numbers of natives adjacent to the lobster grounds that are fully subscribed to.

However, if their treaty right is a 'blank cheque' to fish whenever, wherever and however, then the commercial fishery, as we know it, has been flipped on its head. But the Supreme Court has made it clear that it is not a 'blank cheque', but a limited right to a moderate livelihood and, indeed, it is a 'communal' right and not an individual right as such.

The obligation is on the M'ikmaq as a people to exercise the right in accordance with regulations. The Government of Canada has appointed a Chief Negotiator who has until 15 April, 2000 to arrive at interim fishing plans that accommodate the new treaty rights. Until such fishing plans are tied down, inshore fishermen remain extremely anxious and the social climate in fishing areas where natives and non-natives live in the same broader communities remains tense.

The Maritime Fishermen's Union has been at the centre of the controversy since our inshore fishermen are based in all of the areas where there are significant numbers of coastal M'ikmaq bands.

The MFU recognizes the Supreme Court decision has been a breakthrough for the M'ikmaq. We believe their new rights can be accommodated within the present fisheries management system. The accommodation can be done by means of a voluntary licence retirement programme.

We believe strongly that the accommodation should not be on the backs of fishermen but should be shouldered by the society as a whole through their government.

As we write, it seems the Federal Cabinet will recognize this principle and allocate the appropriate monies to make the adjustments. In the meantime, we want to find ways of making the peace between commercial fishermen and first-nation peoples.

This article is by Michael Belliveau, a Member of ICSF and Executive Secretary, MFU